TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]86

THE JOURNAL AND TRIBUNE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 29, 1919.

(27,073)

(27,033)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 947.

THE JOURNAL AND TRIBUNE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1919.

1 Court of Claims.

No. 32977.

THE JOURNAL AND TRIBUNE COMPANY

v.

THE UNITED STATES.

I. *History of Proceedings.*

The claimant filed its original petition herein on November 14, 1914.

On December 5, 1914 the defendants filed a demurrer to said petition.

On February 7, 1916 the demurrer was argued and submitted by Mr. Harvey D. Jacob, for the defendants, and by Mr. Benjamin Carter, for the claimant. It was thereupon ordered, in open court, that the demurrer be sustained with leave to claimant to amend the petition within 30 days.

On February 16, 1916 the claimant filed an amended petition.

On February 21, 1916 the defendants filed a demurrer to the amended petition.

On March 7, 1916 the claimant filed a motion for leave to file amendment to the amended petition.

On March 8, 1916 this motion was ordered to the files to be heard when case comes on to be heard.

On March 13, 1916 the defendants' demurrer to the amended petition and claimant's motion to file amendment to amended petition *was* argued and submitted by Messrs. Benjamin Carter and F. Carter Pope, for the claimant, and by Mr. Harvey D. Jacob, for the defendants.

On April 3, 1916 the defendants' demurrer to the amended petition was overruled.

On May 17, 1918 the claimant was allowed, in open court, to file an amendment to the amended petition.

The amended petition, and amendment thereto, are as follows:

2 II. *Amended Petition and Amendment to Amended Petition.*

In the Court of Claims.

No. 32977.

THE JOURNAL AND TRIBUNE COMPANY

vs.

THE UNITED STATES.

Amended Petition.

(Amendment Filed February 16, 1916.)

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner, the Journal and Tribune Company, respectfully shows to your Honors the following-stated facts:

I.

Petitioner is a corporation organized under the laws of the State of Tennessee. It publishes, and at the times hereinafter stated did publish, in the city of Knoxville, Tenn., a daily morning newspaper, which was, and is, widely circulated throughout eastern Tennessee and parts of the States of Virginia and North Carolina adjacent thereto.

II.

Throughout said territory a large part of claimant's newspapers were, and are, transported from said city on trains of the
3 Southern Railway Company, operated by way of Bristol, in the State of Tennessee, or Salisbury, in the State of North Carolina, to or toward the city of Washington, in the District of Columbia; said papers being destined for points on a postal route, established by the Postoffice Department, between Chattanooga, also in the State of Tennessee, and Bristol or on other postal routes connecting therewith. The greater part of said papers circulated in said territory were, and are, transported on a train, numbered 4, of said railway company, leaving Knoxville in the very early morning, before daylight.

III.

From some time in the year 1906 until about the first of October, 1908, many packages of said newspapers of petitioner shipped to newsdealers were transported on said train number 4 by the Southern Express Company while many others of said newspaper packages

were carried on the same train by mail to subscribers or dealers. All loading and unloading of mails to and from the trains at said station was and is in charge of a transfer agent of the Postoffice Department.

IV.

Newspapers were at said times, and are by law, second-class mail matter. The laws relative to transmission of the same by mail and the payment of postage thereon were, and are, as follows:

All publications of the second class, * * * when sent by the publisher thereof and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto or to other news agents shall, on and after July first, 1885, be entitled to transmission through the mails at one cent a pound or a fraction thereof, such postage to be prepaid. (Act of Congress approved March 3, 1885, Revised Statutes, First Supplement, Chapter 342.)

Postage on second-class matter mailed shall be collected and accounted for under such regulations as the Postmaster-General may prescribe. (Act of Congress approved June 13, 1898. Revised Statutes, Second Supplement, Chapter 788.)

Among the regulations prescribed by the Postmaster General under said act of Congress of June 13, 1898, are the following, the same being paragraphs in section 451 of the Postal Laws and Regulations promulgated in 1902:

3. Whenever publications of the second class are presented for mailing by the publishers thereof, or a news agent, the postmaster, after weighing the same, * * * will collect the proper postage thereon, and give the publisher a receipt from a book of forms furnished therefor (Form 3539) showing the weight of the matter mailed and the amount collected.

4. For convenience, postmasters may receive from publishers a deposit of money in advance (for which a special receipt must be given) sufficient to pay for more than a single mailing. The deposit will be charged with the proper amount of each mailing; but if the amount on hand is not sufficient at any time to cover the postage due on the entire mailing the excess must be held until an additional deposit is made. Credit for postage must never be allowed. (See sec. 329.)

5. A statement of the amount of postage collected at the rate of one cent a pound, together with the duplicates of receipts issued during the quarter, must be sent to the Third Assistant Postmaster General, together with the weight of free county matter, at the end of each quarter in the special newspaper and periodical envelope provided for that purpose. (Sect. 408.)

The Southern Express Company's rate, which was paid to it by petitioner for the newspapers transported by it in said territory during said period, was one-half of one cent per pound.

V.

At some time in the early part of the year 1906 an arrangement was made between the transfer agent aforesaid, the agent of the express company and petitioner by which said transfer agent took into his possession and weighed into the mails only those pouches or mail sacks of newspapers marked for mail, leaving the packages of newspapers outside of the mail sacks, marked "Express or Baggage," for the agent of said express company, who took the same into his possession and caused them to be transported by express on said train number 4. The packages of newspapers intended for transportation by mail on said train number 4 were delivered at said station in mail pouches marked "U. S. mail for outside delivery at publisher's risk, etc.," which marking was done in accordance with the requirements of the postoffice authorities. Packages of newspapers intended to be transported on said train number 4 by express or baggage were delivered at the same time and place in the station as those intended to be sent by mail, but were plainly marked in prominent type "Express or Baggage" with the name and address of the dealer to whom the same were to be transported.

This plan was followed until about the first day of October, 1908, or for something over two years, during all of which period
6 petitioner delivered the packages of newspapers above indicated, marked and addressed respectively as aforesaid. On or about said last-mentioned date said transfer agent of the Postoffice Department, without the knowledge of petitioner, commenced loading into the mails of said train number 4 of the Southern Railway Company at said station the packages of petitioner's newspapers marked for transmission as aforesaid by express; and said practice continued, without the knowledge of petitioner, until about the first day of April, 1913. Throughout said period delivery of the packages and pouches at said station had continued as aforesaid. When petitioner's officers learned of said improper handling of the newspapers they reported the same to the postal authorities, who made correction thereof, to the effect that the packages of newspapers intended and marked for express have since been transported by that method.

VI.

The aggregate weight of newspapers marked "Express or Baggage" and intended to be transported by express on said train number 4, but in fact weighed into the mails and transported by mail on said train, as aforesaid, between the 1st day of October, 1908, and the 1st day of April, 1913, was 358,442 pounds, on all of which petitioner paid postage to the Postmaster at Knoxville at the rate of one cent per pound. All of which was to the loss and damage of petitioner in the sum of $1,792.21, being the difference between the amount actually paid the defendant as postage, $3,584.42, and the amount it would have been obliged to pay the said Southern Express Company for transporting the said newspapers by express.

Wherefore, petitioner prays judgment against the United
7 States for the sum of one thousand, seven hundred and ninety-two dollars and twenty-one cents ($1,792.21); no part of said sum having been paid to petitioner and its claim to the same not having been assigned, wholly or in part.

THE JOURNAL AND TRIBUNE COMPANY,
By BENJ. CARTER, *Its Attorney in Fact.*

Amendment to Amended Petition.

Filed May 17, 1918.

Petitioner, by leave of court, amends in the following particulars its petition, already once amended:

1. By striking out the last sentence, beginning with the words "All of which was to the loss and damage of petitioner," in the fourth subparagraph of Paragraph V.

2. By striking out the closing paragraph and inserting in lieu thereof the following:

Petitioner prays judgment against the United States in the sum, so paid by it, of three thousand five hundred and eighty-four dollars and forty-two cents ($3,584.42); no part of said sum having been repaid to petitioner and its claim to the same not having been assigned wholly or in part.

BENJ. CARTER,
Attorney for Claimant.

8 III. *General Traverse.*

Court of Claims.

No. 32977.

THE JOURNAL AND TRIBUNE COMPANY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and Submission of Case.*

On May 17th 1918 the case was argued and submitted on merits by Mr. Benjamin Carter, for the claimant, and by Mr. Harvey D. Jacob, for the defendants.

9 V. *Proceedings After Submission of Case.*

On June 3, 1918 the court filed an order filing tentative findings of fact. Both sides were given leave to file objections to, or suggested changes in same, on or before June 14, 1918.

On June 12, 1918 the claimant filed a proposal for amendment of tentative findings of fact.

On June 12, 1918 the defendants filed objections to, and suggested changes in, the tentative findings of fact.

10 VI. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.*

Entered October 28, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Plaintiff is a corporation organized under the laws of the State of Tennessee, and at the times hereinafter mentioned it published daily, in the city of Knoxville, Tenn., a morning newspaper of considerable circulation throughout eastern Tennessee and parts of the States of Virginia and North Carolina adjacent thereto. Throughout this territory a large part of plaintiff's newspapers were transported from said city of Knoxville on trains of the Southern Railway Co. operated between Bristol, Tenn., and Chattanooga, Tenn., said papers being destined for points on a United States postal route between Bristol and Chattanooga or on other postal routes connecting therewith. Many of said papers circulated in said territory were transported on train No. 4 of said Southern Railway, which left Knoxville at 4 o'clock in the morning.

II.

The United States mail was dispatched in wagons from the Knoxville main post office to the office of the mail transfer clerk at the Southern Railway station, which wagons were operated by persons having contracts therefor with the United States postal authorities. The closing hour of the mails at the main post office for said train No. 4 was earlier than suited the convenience of the plaintiff in getting its papers upon said train. Accordingly permission was gotten from the post-office authorities to weigh plaintiff's papers for mailing at the railroad station instead of requiring them to be taken to the post office and there weighed, plaintiff furnishing the scales for that

11 purpose. Plaintiff made an arrangement with the contractor, known to the postal authorities, that the United States mail wagon would carry plaintiff's papers to the station, and this was accomplished by the wagon, sometimes stopping en route with the regular United States mail and sometimes making a special trip to plaintiff's office and getting the papers. For this service plaintiff paid a small sum to the driver of the United States mail wagon each week, and a part of the time a payment was made to the contractors themselves.

Some time during the fall of 1906, while the plaintiff's papers were being transported to the railway station as above stated, plaintiff concluded to effect a saving by availing itself of a difference in the express company's tariff for transporting newspapers in large lots and the regular postal charge for transporting newspapers through the United States mail as second-class mail matter. Plaintiff's agent notified the express company of its purpose to send papers by express and requested the express agent to be on the watch for them. Plaintiff's agent also went to the station to see that the said plan was started right, and for about two years the plan worked satisfactorily. Plaintiff caused copies of its newspapers for news dealers which had theretofore gone by mail to be wrapped in bundles and labeled "Express or baggage—Journal-Tribune—Throw off in dry place [name of city]." Other copies of the paper intended for subscribers and for news dealers, except those intended to be sent by express, were addressed by machine and by plaintiff's employees were placed in mail sacks. The method of transporting the same to the railroad station continued as above stated, and plaintiff's newspapers in bundles and in mail sacks were loaded on said wagon, and the driver thereof instructed to take the same to the railroad station, and did so, and he deposited all said bundles and sacks on the platform of said railroad station where all mail was deposited. The cartage and deposit of said newspapers continued in this manner down to the year 1913. In the greater number of instances plaintiff's papers would arrive at the station a few moments before the scheduled departure of said train and occasionally so late as to require the train to be held beyond its scheduled time for departure. From the fall of the year 1906, and for about a year thereafter, the express company's office adjoined that of the United States mail transfer clerk at the railroad station, the doors of the two opening on the same platform. The plaintiff's agent had notified the express company's agent of the purpose to have certain of the papers go by express, and after that notice, and until about October, 1908, a porter from the express agent's office went to said platform and got the bundles of newspapers labeled as above stated and caused the same to be transported by express.

The United States mail transfer clerk, during the period last mentioned, took the sacks of papers, ascertained the net weight of said papers, and then caused the same to be, and they were, transported as second-class mail matter on said train. The said net weight was duly reported to the Knoxville postmaster by the transfer clerk and the postmaster charged the plaintiff's account with the proper second-class postage for said weight of mail. The system adopted was that the

plaintiff made a deposit with the postmaster to cover postage on the plaintiff's newspaper mail matter as it would accrue from day to day,
and removed the deposit as from time to time it was reduced by
12 charges against it. The regular second-class postage for said net weight reported by the transfer agent was charged against said deposit. During the year 1907 the express company's office was moved to the end of the railroad station opposite said transfer clerk's office, a distance of about 150 yards therefrom. Although the express office, before its location was removed, had another door for the reception of express matter, express packages were sometimes brought by shippers for dispatch on said train No. 4 to said platform upon which said two offices opened. The mail transfer clerk considered that said platform at that point pertained to mail service and that said express matter interfered with the mail. The delivery of such express matter other than newspapers on said platform was stopped. About a year after the removal of the express company's office the express messenger or porter ceased calling at said platform for the bundle of papers which had been labeled "Express or baggage," he having reported to the clerk in charge of the express office that they had been instructed at said platform that the newspaper bundles were no longer to go by express. Thereafter, and down to March 31, 191[illegible] plaintiff's newspapers, whether in sacks or said bundles, were alike treated as mail matter by the United States mail transfer clerk, who weighed the bundles and sacks of papers and reported the net weight as aforesaid.

The regular postal charge for second-class mail matter was regularly charged against plaintiff's deposit and the same was paid by plaintiff during all of said period, and the bundles and sacks were transported to their respective destinations by United States mail as second-class mail matter. During said period there had been a change of agents in the express company's office and also a change of mail transfer clerk. In July, 1912, plaintiff made a contract with a private transfer concern for the transportation from its office to said railroad station of all newspapers that were intended for said train No. 4. That arrangement continued for some six or eight months, at the end of which time the newspapers were carried, as before, by the mail contractor's wagon. In the spring of 1913 the plaintiff's business manager, in looking over the accounts for express and mail matter, had his attention called to the small express bills, and, upon investigation, discovered that the bundles of papers labeled "Express or baggage" were being transported as second-class mail matter instead of by express. He informed the Knoxville postal authorities and the express company that this was contrary to his directions. From and after April 1, 1913, said bundles of papers labeled "Express or baggage" were caused by plaintiff to be delivered to the express company's office at the railroad station for a short time and then the agent of the express company had its porters receive the bundles at the said platform and they were thereafter transported by express.

III.

From October 1, 1908, to March 31, 1913, approximately 358,442 pounds of newspapers were transported by United States mail that were labeled "Express or baggage," as above stated, and had been intended by plaintiff to be transported by express. The plaintiff paid for said matter the regular second-class mail-matter rate of 1 cent per pound, aggregating the sum of $3,584.42. The transportation of the same matter by express would have cost the plaintiff $1,792.21.

13 IV.

From the year 1906 to the year 1913 copies of plaintiff's paper were transported by mail and by express over trains other than said train No. 4 of the Southern Railway Co. Such copies were deposited by plaintiff in the Knoxville post office when for mail transportation, and delivered to the express company's agent on train or at its office when for transportation by express.

Conclusion of Law.

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover; that its petition ought to be, and it is hereby, dismissed; and judgment is rendered against the plaintiff for the cost of printing the record in this cause to be taxed by the chief clerk.

Opinion.

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

For the convenience of plaintiff in getting its newspapers to an early morning train an arrangement was made with the postal authorities under which its newspapers would be weighed at the railroad station instead of being carried to and weighed at the post office, and thence taken to the train. The mail wagon, under an arrangement with the contractor or the driver, would call by plaintiff's place of business, sometimes on its way to the train from the post office with the regular mail, and sometimes by a special trip for that purpose, and get the newspapers. While this plan was in operation the plaintiff decided to secure the benefits of express rates (which were less by one-half than the postal rates for second-class mail matter) on portions of its papers, and, with that object in view, it caused its papers, intended by it to go by mail, to be put into mail sacks, and the portions which it intended to go by express to be wrapped in bundles and labeled "Express or baggage." The sacks and bundles were placed in said wagon and were by the driver deposited on a platform, where the regular mail matter was deposited, at the railroad station. Plaintiff notified the express agent of its purpose to send some of its newspapers by express, and, for some time, porters or messengers of the express company took charge of the bundles

labeled "Express or baggage," and caused them to be transported by express. The defendant's mail transfer clerk weighed the sacks of papers and they went by mail. During that time the express office and the office of the transfer clerk were located near each other and both opened upon the said platform. Later the express office was removed several hundred feet away from where the transfer clerk's office was, but the deposit of plaintiff's papers upon the platform by the driver of the wagon continued as formerly. For about two years, and while the two offices were near each other, there appears to have been no difficulty in handling the papers, as designed for mail or express, but commencing about October 1, 1908, plaintiff's papers in sacks and in the bundles labeled as stated and deposited on said platform were weighed by the defendant's transfer clerk,
11 were placed upon the train, and caused to be transported as second-class mail matter. The postage charges were by the postal regulations payable in advance, and plaintiff made a deposit with the postmaster, which was supplemented as from time to time it was reduced by charges for the weights ascertained as stated. The transfer clerk reported daily to the post office the net weight of the papers transported by mail, and periodically the postmaster rendered statements to plaintiff. The statutory rates for second-class mail matter were applied to the net weights of the papers and were paid by the plaintiff.

The course of action here complained of continued from about October 1, 1908, to about April 1, 1913, during which period there was no complaint. The express company's porters or messengers had ceased to go to said platform and get the bundles marked "Express or baggage." Just why they ceased to go does not definitely appear. There is some testimony to the effect that one or more of the messengers had stated that they were informed at the platform that the plan of delivering papers there designed for express had been discontinued, but from whom that information was derived, if given at all, does not appear.

It seems not improbable that a change of transfer clerks which occurred and a change of location of the express office had something to do with the failure to have the papers go by express instead of by mail.

Plaintiff having during the period of about four years paid the regular second-class mail-matter rate on the papers now seeks to recover the sums paid by it as postage on the weights of the papers labeled "Express or baggage." The original petition claimed the difference between what it would have cost to send them by express and the regular postal rate, and by an amendment the claim is for the entire amount paid as postage. On its brief, plaintiff says "the gravamen of the action, of course, is that the United States holds money of this claimant's which was paid to it under a mistake of fact." The question for decision is whether from the facts found the law will imply a contract on the part of the Government to repay to the plaintiff the sums paid, or any part of them. It is not every mistake, however made, that will sustain or justify a recovery of money paid by a plaintiff to a defendant. Barlow's Case, 132 U. S., 271, 281.

In the instant case, there is no question that the matter was transported as mail matter; no mistake was made in the net weights, nor in the postage rates charged for second-class mail matter. As a matter of fact, the papers went as mail and reached their destinations, though by a more expensive method than plaintiff contemplated. There was not failure of consideration. There was no misrepresentation of the fact of transportation or of the weight or the rate. The money paid by plaintiff was the correct amount that was payable for the weights of papers when transported as second-class mail matter.

The money which plaintiff paid and now seeks to recover was, therefore, in no proper sense paid under mistake of fact. It may be conceded that if actual knowledge had come to plaintiff that its papers were being weighed into and transported as mail it would have taken steps to change that practice. But the situation is not sufficient to raise up an implied contract on the Government's part to return the money received by it for a service that was actually performed.

The court cannot say that the rate to be paid for the papers when carried as second-class mail matter shall be less than the statutory rate. The law has established the charge. Nor can we say that the plaintiff should pay nothing for the service which was rendered and from which the plaintiff got a benefit in the transportation and delivery of its papers.

Whether the defendants would be liable if they were suable as an individual for the act of the transfer clerk we need not consider, because if plaintiff's loss or damage was occasioned by a want of care or the negligent act of the transfer clerk, and without plaintiff's fault, the Government could not be held responsible therefor in this court. For the negligences or misfeasances of its officers or agents the United States have not consented to be sued. Gibbon's Case, 8 Wall., 269.

"Torts committed by an officer in the service of the United States do not render the Government liable in an implied assumpsit, even though the acts done were apparently for the public benefit." Whiteside Case, 93 U. S., 247, 257. In such cases, say the Supreme Court, where it is proper for the Nation to furnish a remedy, Congress has reserved the matter for its own determination. Langford Case, 101 U. S., 341, 346.

The facts not justifying a conclusion that the law raises an implied contract between the parties, the petition should be dismissed, and it is so ordered.

Hay, Judge; Downey, Judge; Barney, Judge, and Booth, Judge, concur.

VII. *Judgment of the Court, Entered October* 28, 1918.

At a Court of Claims held in the City of Washington on the Twenty-eighth day of October, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Journal

and Tribune Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition be and it hereby is dismissed. And it is further ordered, adjudged and decreed that the defendants, the United States, shall have and recover of and from the claimant, the Journal and Tribune Company, as aforesaid, the sum of Five Hundred and Seventy-three Dollars and seventy-six cents ($573.76), the cost of printing the record in said case in this court, to be collected by the Chief Clerk, as provided by law.

BY THE COURT.

VIII. *Proceedings After Entry of Judgment.*

On December 7, 1918 the claimant filed a motion to set aside the judgment.

On December 16, 1918 the claimant's motion to set aside the judgment was overruled by the court. Claimant was given until January 1, 1919 to file a motion to retax the costs.

On December 31, 1918 the claimant filed a motion for retaxation of costs.

On January 14, 1919 this motion was argued and submitted by Mr. Benjamin Carter, for the claimant, and by Mr. Harvey D. Jacob, for the defendants.

On January 20, 1919 the court filed an order allowing claimant's motion to retax costs. Former entry of judgment was vacated and set aside, and new order this day filed entering judgment against claimant for $301.84 as the amount of costs. Judgment otherwise to stand.

17 IX. *Judgment of the Court, Entered Jan. 20, 1919.*

At a Court of Claims held in the City of Washington on the Twentieth day of January, A. D. 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Journal and Tribune Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition be and it hereby is dismissed. And it is further ordered, adjudged and decreed that the defendants, the United States, shall have and recover of and from the claimant, the Journal and Tribune Company, as aforesaid, the sum of Three Hundred and One Dollars and eighty-four cents ($301.84), the cost of printing the record in said case in this court, to be collected by the chief clerk, as provided by law.

BY THE COURT.

18 X. *Claimant's Application for and Allowance of an Appeal.*

Claimant applies hereby for an appeal to the United States Supreme Court from a judgment of this court rendered on the 20th day

of January, 1919, by which a former judgment, dismissing the petition, was modified as regards the amount of the printing cost taxes and otherwise re-affirmed.

BENJ. CARTER,
Attorney for Claimant.

Filed March 3, 1919.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

March 3, 1919.

19 Court of Claims.

No. 32977.

THE JOURNAL AND TRIBUNE COMPANY

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true trans- of the pleadings in the above-entitled cause; of a history of proceedings had in said case; of the findings of fact and conclusion of law and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the claimant's application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fourth day of March, A. D. 1919.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 27,033. Court of Claims. Term No. 947. The Journal and Tribune Company, appellant, vs. The United States. Filed March 29th, 1919. File No. 27,033.

Subject Index.

Authorities Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 337.

THE JOURNAL AND TRIBUNE COMPANY

v.

THE UNITED STATES.

BRIEF FOR APPELLANT.

This appeal relates to newspapers published by appellant which were shipped to news-dealers by one certain train, named Number 4, of the Southern Railway Company, from Knoxville, Tennessee. The suit had its origin in the placing in the mails of packages intended to go by express, and so labeled. Appellant, having paid postage to the Postmaster at Knoxville on the entire weight of the papers carried in the mails, sues to recover so much as was paid on these particular packages.

A contractor employed by the Government carried on a wagon or truck, directly from appellant's office to the railroad station, all of the newspapers that were to go out by mail, those being placed by appellant's employes in mail pouches or sacks; and it was arranged between appellant and the contractor that he would carry at the same time, in the same vehicles, bundles that were to go by express. The mail matter and express matter alike were deposited by the contractor's driver on a platform at the station just inside a gate in a fence

running from the corner of the station building and in line with the outer wall of the express office, which was in the northeast corner of the building and immediately adjacent to the office of the Government's transfer agent, who had charge of the dispatch of all the mails. The plan was that this transfer agent would take, for loading into the mail cars, the pouches or sacks of mail matter so deposited, and that the express company's employes would get the express packages and carry them to the express cars. After this had been going on for some two years the transfer agent commenced taking and putting into the mails the packages labeled for the express, as well as the mail containers, and he continued so to do for some four years and a half, viz., from about October 1st, 1908, to April 1st, 1913, and until appellant's officers, casually learning what he was doing, reported the fact to the Postmaster, whereupon the former, correct practice was re-established.

Appellant, like other newspaper publishers, paid its postage in advance. A deposit of money was made with the Postmaster. The transfer agent reported each day the aggregate weight of the newspapers put into the trains and the Postmaster charged the postage up against the fund until the latter was near exhaustion, when he called for a new deposit. The rate of postage so charged and paid was one cent per pound. The rate which appellant paid the express company for all shipments in that zone (including for the two and a half years the packages here concerned) was one-half of on cent per pound (Rec., p. 9).

At some time in 1907 the express office was moved to new quarters at the other (western) end of the station; but all of the newspapers for this one train, Number 4, were still brought to the old place of deposit and the separation between mail and express matter was correctly made for about a year longer. At the end of that time

porters of the express company, sent to carry the packages to the express cars, returned to its office and reported that the papers were not to go by express any longer, and for this reason no attempt was made thereafter by that office to handle the packages.

One, at least, of two successive transfer clerks who served the Government resented the use of the platform, abutting his office and the express office, for the express matter, saying that it interfered with the mail. In this connection the Court of Claims (Rec., p. 8) has found that "the delivery of such express matter other than newspapers on said platform was stopped." In its opinion the court (p. 10) says:

> "It seems not improbable that a change of transfer clerks which occurred and a change of the express office had something to do with the failure to have the papers go by express instead of by mail."

In the spring of 1913 plaintiff's business manager for the first time observed a considerable falling-off in the bills of the express company, and he then made investigation which disclosed the diversion of the packages here referred to from the express service to the mail.

ASSIGNMENT OF ERRORS.

There is hereby assigned as error committed by the Court of Claims:

(1). That there was not held to be an obligation upon the United States to refund to appellant the moneys received from it in consequence of a mistake.

(2). That judgment was not given in claimant's favor for the entire amount of the money so received by the United States.

(3). That judgment was not given in claimant's favor for the excess of the money so received above the

amount which claimant necessarily would have paid for service performed by the express company, as intended.

(4). That the petition was dismissed.

PROPOSITIONS OF LAW.

When one pays money by reason of the supposition that something is true, which would entitle the other party to the money, but which is untrue, and the money would not have been paid if the payer had known such fact did not exist, he may recover the money by any action not forbidden or barred by law.

United States v. *Barlow*, 132 U. S., 271.
Wisconsin Central R. R. Co. v. *United States*, 164 U. S., 190.
Meyer v. *Mayor etc.*, 63 N. Y., 435.
Union Nat. Bank v. *Sixth Nat. Bank*, 43 N. Y., 451.
City of Louisville v. *Harlan*, 97 Ky., 208.
Pool v. *Allen*, 29 N. C., 120.
Baltimore & Susquehanna R. R. Co. v. *Faunce*, 6 Gill., 68.
16 Cyc., 744, and numerous cases cited.

If money, having been taken by an officer of the Government without warrant of law, is in the Government's treasury, the Court of Claims has jurisdiction of a suit for its recovery.

Knote v. *United States*, 95 U. S., 149.
Ittner's case, 43 Ct. Cls., 336.
Cartas's case, 48 Ct. Cls., 163.
Pharis's case, 16 Ct. Cls., 501.
Devlin's case, 12 Ct. Cls., 266.

No action lies against one person for anything done, assumed to be of value to such person, by another who

had no reason to believe the supposed beneficiary desired that the thing should be done by him.

Clary v. *Wolf*, 34 R. I., 263.
Hunt v. *Cates* (*Col.*), 157 Pac., 1162.
Belknap v. *Hayden*, 1 Ky. Law Rep., 119.
Boyer v. *Joyal*, 164 Mich., 662.
Johnson v. *Boston & Maine R. R. Co.*, 69 Vt., 521
Whitsell's case, 34 Ct. Cls., 5.
Day v. *Caton*, 119 Mass., 513, 515.
Keener on Quasi Contracts, sec. 341.

There can be no estoppel of one party in a suit by reason of any action taken by him which did not mislead the other party in the determining of his own course.

Leggett v. *Standard Oil Co.*, 149 U. S., 287 (294).
City of Louisville v. *Harlan*, sup.
Weller v. *Harrison Land Co.* (Mich.), 161 N. W., 894.
Kretz v. *Fireproof Storage Co.*, 133 Minn., 285.
Plummer v. *Mold*, 22 Minn., 15.
Stoddard v. *Johnson*, 75 Ind., 20.
Himrod v. *Ft. Pitt M. & M. Co.*, 220 Fed., 80, C. C. A.
Appeal of Columbus S. & H. R. Co., 109 Fed., 177 (217), C. C. A.
Atkinson v. *Plum*, 50 W. Va., 104.
Lash v. *Rendall*, 72 Ind., 475.
Lawrence v. *American Nat. Bank*, 54 N. Y., 432.
Edward v. *McEnhill*, 51 Mich., 160.

He who claims an estoppel of his adversary assumes the burden of proving every element thereof.

Perkins v. *Mo. Pac. Ry. Co.*, 76 Nebr., 242 (252, 253).

Beaufort County Lumber Co. v. *Price*, 144 N. C., 50.

Cooper v. *Association of Railway Conductors*, 156 Ia., 481.

Petring v. *Heer Dry Goods Co.*, 90 Mo., 649 (657, 658).

Elliott v. *Keith* (*Ga.*), 102 Ga., 117.

Blanck v. *Pioneer Mining Co.*, 93 Wash., 26.

Sawyer v. *Metters*, 133 Wis., 350 (358).

ARGUMENT.

The ground of this action is that appellant, when it made its periodical remittances to the Knoxville Postmaster, prepaying its postage, understood that it was paying on those papers alone which were pouched for the mail, but in fact was paying also on packages which had been prepared for, and were supposed to be going by express. Details are that appellant was innocent of any share in the mistake by which the diversion of those packages was made; that the Government's officer who put the packages into the mail knew they did not belong there, and that claimant's manager made his objection and had the mistake corrected as soon as it came to his notice.

The best possible case for the Government is that knowledge can not be imputed to it, and that none of its officers superior to the transfer agent actually know what was going on—in other words, that there was a mutual mistake of the parties to the payments of the postage.

While in relation to such a mistake (if the factors of estoppel are absent) there is no occasion to measure blame between the parties, it is clear enough that nobody can be blamed in this case but the transfer agent, to whom during some two years the express packages,

trenching upon the space outside his office that he wanted for trucking of the mails to and from the trains, had become an offense. Nobody but him and the employes of the express company had opportunity to lay hands on any part of the matter coming from appellant's office which was delivered into the station by the contractor's wagon, and the express people during the period in question did not lay hands on any part thereof. Nobody but the transfer agent had any motive for diverting the packages to the mail.

If the driver of the transfer vehicle be deemed to have been appellant's agent, it must be remembered that his functions stopped at the gate into which he passed his entire loads. He had no responsibility whatever for the separation of express matter from mail-containers. In point of law the separation had been made when the packages left the publication office, all mail matter being in pouches or sacks—which were to be opened by the mail clerks on the trains and the contents "worked" —and the express matter being wrapped in bundles, plainly labeled, each to be delivered solid at the railroad station of destination. The transfer agent, then, who interfered with appellant's plan, necessarily knew he was so doing.

There was nothing to put appellant on notice that there was any diversion of the matter intended for the express. It does not appear that the Postmaster rendered any bills or otherwise advised appellant of the separate weights of the mail newspapers going by any train. Indeed it may be presumed that the Postmaster had no such information himself; that the transfer agent each day footed up appellant's papers which had been mailed on all the trains and sent those figures, and nothing more, to the Postmaster. As for bills of the express company, it was natural enough, in a constant business, going on every day, that a considerable

total of charges would be allowed to accumulate before bills were sent and settlement made; and it should not occasion surprise that in a business of this magnitude the disappearance from these bills of so small a quantity of papers escaped observation.

The United States has money of appellant which in equity and good conscience it is bound to refund.

By whosoever act, or whosoever negligence, if any, the thing occurred, the United States received appellant's money through a mistake and still holds the money. The mistake, of course, was in the belief of appellant's manager that it was paying to the Postmaster postage on those papers alone, truly mail matter, which were leaving its offices in mail pouches and sacks. The Court of Claims in its opinion (p. 11) says that "there was not failure of consideration;" also: "The situation is not sufficient to raise up an implied contract on the Government's part to return the money received by it for a service that was actually performed." But when too much had been paid to a mail contractor because it was believed he had employed special facilities which in truth he had not employed (*Barlow's case*, 132 U. S., 271) this court said: "As in the case of goods not delivered or work ordered not done, the consideration to the party paying has failed;" while in *Knote's case* (95 U. S., 149), as in later cases in this court, it was pointed out that there was an implied contract to return the money paid by mistake.

It is inconceivable that a claim should not be entertained to recover money mistakenly paid merely because there was included in the same payment other money really due. This latter, in fact, is what occurred in Barlow's case. Payment was really due him for star-route service as originally outlined in his contract, and something more was paid at the same time on the

mistaken belief that, for some added burdens, he had been compelled to increase his equipment. He retained, of course, so much as actually was due him and the Government recovered that which should not have been paid him.

The Court of Claims also says in the opinion (p. 10): "It is not every mistake, however made, that will sustain or justify the recovery of money paid by a plaintiff to a defendant." Whatever the court may have had in mind as qualifying the rule stated in the case it was citing (Barlow's), the law undoubtedly is that where only one party was mistaken, the contract, or the action had thereunder, will not be upset at the suit of the other party, who had a correct understanding of the facts; that in the case of a *mutual* mistake of fact, if that be chargeable to the act or negligence of one party alone, there is no remedy for that party if the other party, relying on what was done or omitted, had been led into a disadvantageous position. Larger qualifications are not to be found in the adjudicated cases or the text books.

The Government's officers did not act in any reliance on appellant's attitude, and the government will not have suffered any injury from appellant's quiescence—There is no estoppel.

Among the necessary elements of an estoppel, in relation to action or non-action of a plaintiff, are (1) that the defendant was ignorant of the real facts, and (2) acted with reliance upon plaintiff's attitude, and (3) he will have been injured thereby if the plaintiff have a judgment against him.

In regard to the situation of the parties illustrations, from among the cases cited above (p. 5), follow:

The plaintiff in *Leggett* v. *Standard Oil Co.*, 149 U. S., 287 (294), had confided to the defendant a new process

and the defendant had promised not to use the same without his consent. The defendant had broken its promise, and put the process to use. Meanwhile the plaintiff, believing he had been indiscreet in communicating his supposed invention, applied for and obtained a patent. The defendant did not know that the plaintiff intended to seek a patent. It was held that, since the plaintiff, in delaying action to get a patent, had not relied on the defendant's attitude, there was no estoppel.

In *Richardson* v. *Walton* (C. C. A.), 49 Fed., 888 (895), there was held to be no estoppel because the party claiming it knew the incorrectness of the assumption of fact on which the other party was acting and therefore could not have been said himself to have relied on that action—the parties having been partners in business and equally concerned in the matters out of which the suit arose.

The city of Louisville had contracted to pay for keeping pumps in order at a fixed price per pump, and, having paid the contractor for three years as for twice as many pumps as he actually looked after, was held in *Louisville* v. *Harlan*, 97 Ky., 208, not to be estopped to reclaim the overpayment, the contractor himself having known that the number was overstated.

In *Plummer* v. *Mold*, 22 Minn., 15, plaintiff, a mill-owner, sued for the price of sawing into lumber logs which belonged to the defendant. He claimed that the defendant, having received and used the lumber, was estopped to say the sawing was not properly done. The decision was for the defendant because the plaintiff himself knew "as well as, if not better, than the defendant," that he had not done what he contracted to do.

Stoddard v. *Johnson*, 75 Ind., 20, arose out of the construction of a county road and assessments therefor on abutting property owners under a law afterwards held to be unconstitutional. The decision was that a

property owner was not estopped to resist the assessment because he had stood by with full understanding and permitted the work to be done. The court said (p. 23):

> "As a rule, there can be no estoppel by conduct short of binding contract, where the facts out of which the estoppel is claimed to arise are known to all parties."

It may be conceded that if the present appellant knew, or was charged to know, that the newspapers in question were going by mail and then continuously, without protest, submitted to the Postmaster's exaction the postage thereon, it would be estopped to claim a refund—provided some disadvantage to the Government had supervened. As is pointed out above, however (p. 7), appellant had no knowledge of the diversion of the packages and there was nothing to charge it with knowledge of the facts. To create an estoppel, it is not sufficient that the party whose act is pleaded might well have known the true facts. There must have been a somewhat high degree of negligence on his part to charge him with such knowledge.

Himrod v. *Ft. Pitt M. & M. Co.*, 220 Fed., 80.
Long v. *Anderson*, 62 Ind., 507.
Atkinson v. *Plum*, 50 W. Va., 104.
Mountain Lake Association v. *Shart-er*, 83 Md.,10.
Baltimore & Susquehanna R. R. Co. v. *Faunce*, 6 Gill., 68.

If there occurred here the conditions which these decisions suggest, the remaining factor, to make good an estoppel, would be that the Government had been at some expense in the carriage of the packages in question by mail—for there is no other prejudice that the Government could conceivably have suffered. Brief reference to some of the cases cited above will show how

tightly the lines are drawn in requiring proof of some prejudice by one who relies upon a plea of estoppel.

Some of these decisions related to money paid under mistakes of fact, and it was held that in such a case it is no defense that there had been a want of care by one party if the other party suffered nothing in consequence thereof.

Seven cases cited above (pp. 5 and 6) show how stringent is the rule which requires that he who claims an estoppel against his adversary must prove every element thereof. In those instances the rule might seem to be carried to extreme lengths if it were not remembered that estoppels are not favored. Before the present appellant could be estopped to have a refund of its money it would be necessary for the Government to prove—if the facts had existed—(1) that there was no reason, other than that here shown, for diminished amounts in the express company's bills rendered occasionally to appellant and that the diminution was sufficient, in comparison with appellant's entire issues of newspapers, to incite a business man, using ordinary care, to inquire the details of the business covered by the bills; that the Postmaster, assuming that appellant was informed of the facts, understood its silence to mean that it chose not to have the transfer agent's activities, and the postage charges, restricted to the mail matter pouched and sacked, and (3) that, through this unresisted transportation of the express-labeled bundles by mail, the Government suffered some expense.

There is undisputable evidence, within the judicial knowledge of this court, that except for the six last months (subsequent to June 30, 1912) the transportation of these particular mails cost the Government nothing.

The Southern Railway Company received—every railroad company receives—a *salary* for carrying the

mails; the amount being fixed as to each mail route, for each succeeding term of four years, by ascertaining the quantity of mails carried during a minimum period of 105 days shortly anterior to the commencement of the contract term. This salary stands for the entire four years; it is not increased one cent or diminished one cent, whether by variations in quantity of the mails originally allotted by the postal authorities to the route or by changes in routing of the mails or by any other fortuities. So then, when the bundles of newspapers here in question were added to the mails which were carried by the Southern Railway Company, the amount to be paid by the Government to the company for the mails of that route at large were not affected; and the net results of the transactions complained of in this suit are that the Government incurred no disadvantage by its taking over of the bundles and *per contra* has had in its treasury, under no liability for interest, for an average period of more than two years, moneys taken from appellant to the amount of $3,584.42.

The contracts between the Southern Railway Company and the Government for the transportation of the mails were signed in 1904, 1908 and 1912, effective on July 1st in each of those years. The above observations are pertinent, therefore, to what occurred between October 1, 1908, and June 30, 1912. For the 1912-1916 contract of the railroad company, the mails were weighed in the spring of 1912, and therefore the particular mails here concerned did enter into the basis on which the salary for that contract term was fixed. How they could have affected the railroad company's compensation is easily computed.

The average daily weight of mail carried over this whole postal route (No. 127,002) according to the weighing of 1912, was 27,393 pounds. The length of the route,

Chattanooga to Bristol, is 242 miles. From Knoxville to Bristol is 131 miles. (Report of Second Assistant Postmaster General for 1912, p. 93.) The 358,442 pounds were carried in a period of 1,643 days (four years and a half). The average per day, then, was 218 pounds. Two hundred and eighteen pounds carried 131 miles is equivalent to 114 pounds carried 242 miles. Above 5,000 pounds the weight included in the 27,393 pounds (22,393) took an even rate per mile per annum of about $1,015 per hundred pounds. (Postal Laws and Regulations of 1913, Section 1319, Note A.) For the route (242 miles) at this rate the annual pay for 100 pounds was $245.63, and for 114 pounds the annual pay was $280.62; and for the nine months between July 1, 1912, and April 1, 1913, the pay was $210.02.

This $210.02 is all the loss the Government could have suffered through the mistaken addition to the mails. It does not follow that it actually has suffered this loss, or any loss whatever. Firstly, as regards the remaining three years and three months of the 1912-1916 contract the postal authorities should have made the proper reduction in the compensation of the railroad company. It is to be presumed that these officers did their duty and that a reduced rate of compensation was in fact paid to the railroad company commencing on April 1, 1913. For a correction nothing more was necessary than a new computation at the Postoffice Department, based upon a daily average weight of 27,175 instead of 27,393 pounds. Secondly, with respect to the actual overpay the postal authorities could, and doubtless did, recoup the $210.02 out of the railroad company's pay for the remainder of the term. (Here *Meyer* v. *Mayor, etc.*, sup., is strictly in point.) In the Government's favor correction of such a mistake may be made at any time. *Wisconsin Cen-*

tral R. R. Co.'s case, 164 U. S., 190; *Grand Trunk Western Ry. Co.'s case*, 53 Ct. Cls., 473.

Again, in regard to this $210.02 expended there is no estoppel because the other conditions necessary thereto were absent; appellant still did not know and the Government's officers did know that the mail was larger than it should have been.

Measure of the Damages.

Upon one view of the law appellant is entitled to a refund of the entire $3,584.42 paid to the Government in excess of the postage due on the contents of the mail pouches and sacks. Appellant had reasons for not wanting the Government, *i. e.*, the post-office car, to carry the other papers. The findings say that an economy of 50 per cent was to be effected by availing of the express service. It is not to be presumed there were no other considerations to recommend the express. The court, for one thing, may readily believe that the newspapers, delivered by express messengers to consignees at the stations, would be on sale in the towns sooner than could be accomplished by mail shipment with delivery at the postoffice. Moreover, the Government in point of law knew that claimant did not desire its services for carriage of these papers. Then it can not be said that by implication the Government had a promise from appellant to pay for the service.

No one may force his services on another. *Keener on Quasi Contracts*, sec. 341; *Clary* v. *Wolf*, 34 R. I., 263; *Belknap* v. *Hayden*, 1 Ky. Law Rep., 119.

If, for the reason that carriage by express would have cost appellant one-half of what it has paid, the Government may retain that much, the services of the Government will in so far have been forced on appellant to the ousting of the express service.

It is said that in a judgment redressing a mistake deduction must be made for any benefit which the plaintiff reaped at the defendant's expense. (Woodward on Quasi Contracts, secs. 20, 24.) Should a defendant take credit for an unsolicited benefit conferred, without expense to itself, on the plaintiff? The present defendant, it may be repeated, is presumed not to have suffered any expense in the process of doing something which was supposed to confer a measure of benefit on plaintiff.

BENJAMIN CARTER,
Attorney for Claimant.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE JOURNAL & TRIBUNE COMPANY
v.
THE UNITED STATES.
No. 86.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the judgment of the Court of Claims against the claimant on the merits (53 C. Cls. 612).

The amended petition asserted the right in claimant, the publisher of a daily morning newspaper in Knoxville, Tenn., to recover from the Government the difference between the amount paid by it to the Government for carrying certain of its newspapers as second-class mail from Knoxville and what it would have had to pay the Southern Express Company, if, as it intended, the same newspapers had been carried by the express company. The claim is grounded on mistake. That the newspapers were actually transported as second-class mail is not

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questioned, but it is contended that the claimant did not intend to have them so transported but did intend to have them sent by express, and that its payment to the Government for the service actually rendered by it, through a period of almost five years, must be considered as money paid by mistake. The postal rate paid to the Government on the newspapers was 1 cent per pound, the statutory newspaper rate. The express company would have charged one-half cent per pound had the shipments been made by it.

The amount originally claimed was $1,792.21, which is under the amount requisite to give this court jurisdiction on appeal by plaintiffs from the Court of Claims. The amended petition states (Rec. 4, 5):

> The aggregate weight of newspapers marked "Express or baggage" and intended to be transported by express on said train number 4, but in fact weighed into the mails and transported by mail on said train, as aforesaid, between the 1st day of October, 1908, and the 1st day of April, 1913, was 358,442 pounds, on all of which petitioner paid postage to the postmaster at Knoxville at the rate of 1 cent per pound. All of which was to the loss and damage of petitioner in the sum of $1,792. 21, being the difference between the amount actually paid the defendant as postage, $3,584.42, and the amount it would have been obliged to pay the said Southern Express Company for transporting the said newspapers by express.

> Wherefore, petitioner prays judgment against the United States for the sum of one thousand seven hundred and ninety-two dollars and twenty-one cents ($1,792.21); no part of said sum having been paid to petitioner and its claim to the same not having been assigned, wholly or in part.

On the day of trial, May 17, 1918, the claimant by leave of court amended its amended petition by striking out all of the above quotation except the first sentence and by inserting in lieu thereof—

> Petitioner prays judgment against the United States in the sum, so paid by it, of three thousand five hundred and eighty-four dollars and forty-two cents ($3,584.42); no part of said sum having been repaid to petitioner and its claim to the same not having been assigned wholly or in part. (Rec. 5.)

The findings of fact by the Court of Claims (Rec. 6–9) give a concise and clear statement of the controversy, which it is unnecessary to repeat.

BRIEF OF ARGUMENT.

I. This court is without jurisdiction, the amount in controversy being less than $3,000.

II. The facts found establish no enforceable contractual obligation of the United States.

ARGUMENT.

I.

This court is without jurisdiction, the amount in controversy being less than $3,000.

Section 242 of the Judicial Code (R. S. 707) provides:

> An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine.

It is apparent by the petition and from the findings of fact that the amount in controversy in this action is less than $3,000. Viewing the claim in the most favorable light and assuming that an actual mistake was made, of a kind that would predicate recovery, the amount that could be recovered could not exceed the difference between the amount paid as postage and the amount which would have been paid had the newspapers been sent by express. Concededly, the claimant received a benefit; in fact, it obtained the object it desired, the transportation of its newspapers. Something was due the Government, it could not be less than the express rate, and this much it would be entitled to retain in any event. *Woodward*, The Law of Quasi Contracts, section 20, p. 30; *Keener* on Quasi Contracts, p. 41; *Merchants National Bank* v.

National Bank of the Commonwealth, 139 Mass. 513. The amended petition was drawn on this theory, asking judgment for $1,792.21; by amendment this claim was increased to $3,584.42, the entire amount paid the Government, ignoring the facts, noted above, that the claimant was actually rendered service, given consideration for the money it paid. The amendment amounts simply to a statement in the prayer of the petition that an amount is in controversy which would give the right to appeal to this court. The petition on its face, and the facts as found by the Court of Claims, show that if claimant is entitled to recover at all it can not recover more than $1,792.21, and that therefore this is the amount in controversy. The appeal should accordingly be dismissed.

Vance v. *Vandercook Co.*, 170 U. S. 438, 472;
Barry v. *Edmunds*, 116 U. S. 550, 560;
Wilson v. *Daniel*, 3 Dallas, 400, 407;
Grand Trunk Western Ry. Co. v. *United States*, 246 U. S. 652.

II.

The facts found establish no enforceable contractual obligation on the part of the United States.

The newspapers were delivered to the agent of the Government, the mail transfer clerk, at the railway station, by the agent of claimant. Claimant, had it desired, could have delivered all newspapers intended for transportation as mail to the post office, and those intended to be sent by express, to the express company, thus avoiding any possibility of mistake.

However, for its own convenience, it made a contract to have its newspapers transported directly to the railway station and there delivered to the mail transfer clark. Under an arrangement with the express company, an agent of that company, for a time, obtained certain newspapers from the mail transfer clerk. It was no part of the duty of the mail transfer clerk to deliver express matter to the express company for claimant. After a short time this loose plan ceased to work, either by reason of moving the office of the express company, the failure of the express company's agent to obtain the newspapers from the mail transfer clerk, or a change in mail transfer clerks; for none of which is the Government responsible. The mail transfer clerk then began to do what it was his duty to do, namely, weigh into the mails all mailable matter left on the station platform at the place where such matter was always deposited. This he did for the period from October 1, 1908, to March 31, 1913, without any protest or contrary instructions, and during all this period claimant paid the postage on each consignment of mail. (Findings of fact, R. bottom p. 7, top p. 8; petition, R. 3, 4.) In March, 1913, the business manager of claimant "discovered" that newspapers intended by it to be sent by express, during all this period, had been transported as mail and the postage paid by claimant. Thereupon it took the necessary steps to the end that papers to be sent by express were delivered to the agent of the express company and not to the mail transfer clerk of the United

States; and commenced this action to recover what it might have saved if it had taken this ordinary precaution sooner.

It is clear that there is no contractual obligation on the part of the United States to repay anything to claimant. It is sought to build a case of quasi contract on the ground of mistake. This presupposes the erroneous belief that a certain fact exists or will exist. (*United States* v. *Barlow*, 139 U. S. 271, 281, 282; *Woodward*, The Law of Quasi Contracts, sec. 10.) There was no such mistake in this case. The newspapers were actually transported as mail by the Government and the claimant was charged by the Government and paid to it the amount fixed by law for the services rendered. Claimant's theory is, however, that it did not intend to have the Government perform this service. Granting that this is true, the newspapers were delivered, *by the agent of claimant* to the agent of the Government whose duty was only to weigh and transfer mailable matter of this class to the train which was to carry it. If this mail transfer agent owed any duty to claimant and neglected it to claimant's loss, he might be personally liable; the Government is not. There was no mistake that will form the basis of an action in quasi contract, there was really no mistake at all. Claimant failed, through neglect, or by reason of its own inefficient agents, to have delivered to the agent of the express company newspapers it intended to send by express; instead, it delivered its newspapers, at the usual place for such mail, to the agents of the United States in charge of sending such

mail and they were sent by mail just as if they had been delivered at the post office. For all purposes of this case the station platform in charge of the mail transfer agent may be considered as the post office. For this service the claimant was charged the rate prescribed by law which it paid. This practice continued for almost five years.

The case lacking the one essential element for its foundation, it is unnecessary to call attention to other principles of the law of mistake which would defeat its action even if the first essential existed, namely: There was no failure of consideration (*Claflin* v. *Godfrey*, 21 Pick. 1; *Keener*, Quasi Contracts, p. 34 et seq.); the Government is in no sense to blame, and to allow a recovery would allow the claimant to enrich itself unjustly; claimant's loss, if any, was due to its own negligence (*Keener* on Quasi Contracts, pp. 67, 71, and cases there cited), and, finally, laches. The service was rendered and postage paid daily, throughout a period of almost five years; claimant was certainly chargeable with knowledge of what it was paying as postage and what amount of postage it was sending. (*Woodward*, The Law of Quasi Contracts, Section 31 and cases there cited.)

CONCLUSION.

It is submitted that on the merits the judgment of the Court of Claims was correct and should be affirmed.

FRANK DAVIS, JR.,
Assistant Attorney General.

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